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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL AUSTIN,
Petitioner,

v.

CHARLES E. HEALY, United States Marshal
for the Eastern District of New York,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

VICTORIA TOENSING
Counsel of Record
JOSEPH E. DIGENOVA
STEVEN L. ZELINGER
SUZANNE M. DOHRER
MANATT, PHELPS & PHILLIPS
1200 New Hampshire Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 463-4300
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether Article III is violated when a magistrate makes the ultimate adjudicatory determination, specifically, to hear and decide the fundamental rights at stake in an international extradition case, with no assignment, review or supervision by an Article III Judge.

2. Whether 28 U.S.C. § 636 and 18 U.S.C. § 3184 permit a magistrate to make the ultimate adjudicatory determination, specifically, to hear and decide the fundamental rights at stake in an international extradition case, with no assignment, review or supervision by an Article III Judge.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, TREATY, STATUTORY AND RULE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Proceedings Below	4
1. Proceedings Before Magistrate	4
2. Judicial Proceedings	5
B. Constitutional and Statutory Framework	6
REASONS FOR GRANTING THE WRIT	9
I. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S EXERCISE OF JURISDICTION IN ISSUING THE FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN VIOLATES ARTICLE III OF THE UNITED STATES CONSTITUTION, WHERE THERE WAS NO CONSENT AND WHERE THE ARTICLE III JUDICIARY ABDICATED ITS DUTIES TO ASSIGN, SUPERVISE, AND REVIEW THE CASE	11
A. The Court Has Never Determined The Constitutionality of A Magistrate's Deciding the Ultimate Matter in An International Extradition Case	12
B. A Trilogy of This Court's Decisions Addresses the Boundaries of Non-Article III Jurisdiction	13

TABLE OF CONTENTS—Continued

Page

C. The Decision Below Is Contrary to This Court's Prior Holdings and Violates Article III 16

II. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN TO STAND TRIAL IN A FOREIGN COUNTRY WITH NO INVOLVEMENT OF THE ARTICLE III JUDICIARY VIOLATES 18 U.S.C. § 3184 AND 28 U.S.C. § 636 18

A. The History of International Extradition Does Not Validate the Practice of Non-Article III Ultimate Adjudication 19

1. An Historical Perspective: 1795-1848.... 19

2. The International Extradition Statute, First Enacted in 1848, Permits Magistrates to Hear Extradition Cases Only If "Authorized So To Do" 21

B. The 1968 Federal Magistrates Act Remedied Defects in the Commissioner System 23

C. The Present Statutory Scheme Does Not Permit a Magistrate to Make the Ultimate Adjudicatory Determination 24

1. The Extradition Statute Confers No Jurisdiction Upon Magistrates, As the Plain Terms Require Special Authorization.... 25

2. The Magistrates Act Does Not Confer Powers on Magistrates to Conduct Extradition 26

3. A Local Court Rule Does Not Validate An Unconstitutional Practice 27

CONCLUSION 28

TABLE OF CONTENTS—Continued

APPENDIX:

	Page
Decision of the United States Court of Appeals for the Second Circuit (Sept. 21, 1993)	1a
Corrected Memorandum and Order of the United States District Court for the Eastern District of New York (Apr. 20, 1993)	15a
Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing (Nov. 5, 1993)	27a
Certification and Order of Extraditability (Jan. 29, 1993)	29a
Mandate of the United States Court of Appeals affirming the Judgment of the District Court (Nov. 18, 1993)	32a
Article III, United States Constitution	34a
Amendments IV and V, United States Constitution	35a
Extradition Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland	36a
Supplemental Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland	46a
Extradition Act: Fugitives from foreign country to United States, 18 U.S.C. § 3184 (1992)	50a
Extradition Act: Evidence on hearing, 18 U.S.C. § 3190 (1992)	51a
Federal Magistrates Act: Jurisdiction, powers, and temporary assignment, 28 U.S.C. § 636 (1992)	52a
Rule 9 of the Joint Rules for the United States District Courts of the Southern and Eastern Districts of New York	59a

TABLE OF AUTHORITIES

CASES — Page

Charlton v. Kelly, 229 U.S. 447 (1913) 6, 23
Collins v. Miller, 252 U.S. 364 (1920) 6, 12, 13, 18
Commodity Futures Trading Commission (CFTC) v. Schor, 478 U.S. 833 (1986) ..... *passim*
David v. Attorney Gen. of the United States, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983) 6
Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) 19
Esposito v. Ames, 700 F. Supp. 1470 (N.D. Ill. 1988) 6
Ex Parte Kaine, 14 F. Cas. 78 (C.C.S.D.N.Y. 1853) (No. 7,597) 9, 22, 25
Ferndandez v. Phillips, 268 U.S. 311 (1925) 4, 5
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 8, 27
Gomez v. United States, 490 U.S. 858 (1989) ..... *passim*
Hill v. United States, 737 F.2d 950 (11th Cir. 1984) 6
Holiday v. Johnston, 313 U.S. 342 (1941) 25
Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840) 20, 21
Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978) 7
In re Adutt, 55 F. 376 (C.C. D. Ill. 1893) 25, 26
In re Farez, 8 F. Cas. 1007 (C.C.S.D.N.Y. 1870) (No. 4,645) 5, 18, 19
In re Kaine, 55 U.S. (14 How.) 103 (1852) 8, 11, 22
In re Mackin, 668 F.2d 122 (2d Cir. 1981) 4, 6, 10, 16
In re McMullen, 989 F.2d 603 (2d Cir.), *cert. denied sub nom. McMullen v. United States*, —— U.S. ——, 114 S.Ct. 301 (1993) 6
In re Metzger, 46 U.S. (5 How.) 176 (1847) 22
In re Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983) 6
Ng Fung Ho v. White, 259 U.S. 276 (1922) 16
Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988) 13
Peretz v. United States, 501 U.S. ——, 111 S. Ct. 2661 (1991) ..... *passim*
Rice v. Ames, 180 U.S. 371 (1901) 6, 25
United States v. Raddatz, 447 U.S. 667 (1980) 3, 11, 15, 16

TABLE OF AUTHORITIES—Continued

	Page
United States v. Rauscher, 119 U.S. 407 (1886)	21
United States v. Robins, 27 F. Cas. 825 (D.C.S.C. 1799) (No. 16,175)	8, 19, 20
Vaccaro v. Collier, 38 F.2d 862 (D. Md. 1930), *aff'd in part and rev'd in part*, 51 F.2d 17 (4th Cir. 1931)	25, 26
Ward v. Rutherford, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed sub nom. Ward v. Attridge*, 501 U.S. ——, 111 S. Ct. 2844 (1991)	9
Wingo v. Wedding, 483 F.2d 1131 (5th Cir. 1973), *aff'd*, 418 U.S. 461 (1974)	24, 25, 27
UNITED STATES CONSTITUTION	
U.S. Const. art. III	*passim*
U.S. Const. amend. IV	2, 3
U.S. Const. amend. V	2, 3
TREATIES	
Jay Treaty, 8 Stat. 116	19, 20
Treaty of Extradition between United States and United Kingdom, 28 U.S.T. 229, T.I.A.S. No. 8468	2
Supplemental Treaty of Extradition between the United States and United Kingdom, reprinted in *International Judicial Assistance*, Volume 5 (1990)	2
Webster-Ashburton Treaty	21
STATUTES AND REGULATIONS	
18 U.S.C. § 3142	7
Extradition Act, 18 U.S.C. §§ 3181-3196	7
18 U.S.C. § 3184	*passim*
18 U.S.C. § 3190	5
18 U.S.C. § 3401	7
28 U.S.C. § 392 (1926)	27
28 U.S.C. § 393 (1926)	27
Federal Magistrates Act, 28 U.S.C. §§ 631-639	7
28 U.S.C. § 636	*passim*
28 U.S.C. § 636(a)	7

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 636(a) (1)	5, 18, 26, 27
28 U.S.C. § 636(b) (1) (A)	7
28 U.S.C. § 636(b) (1) (B)	7
28 U.S.C. § 636(b) (3)	7
28 U.S.C. § 636(f)	7
28 U.S.C. § 758 (1926)	27
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	5
28 U.S.C. § 2241	5
28 U.S.C. § 2241(a)	2
28 U.S.C. § 2253	5
28 U.S.C. § 2255	5
Act of March 2, 1793, 1 Stat. 334	23
Act of February 20, 1812, 2 Stat. 672	23
Act of March 1, 1817, 3 Stat. 350	23
Act of August 23, 1842, 5 Stat. 516	24
Act of August 12, 1848, ch. 167, 9 Stat. 302	21
Act of June 19, 1876, ch. 133, 19 Stat. 59	23
Act of June 6, 1900, ch. 793, 31 Stat. 656	23
Rev. Stat. §§ 5270-76 (1873)	23, 25
CONGRESSIONAL MATERIALS	
Congressional Globe, 30th Cong., 1st Sess. 868 (1848)	10, 22
Congressional Globe, 30th Cong., 1st Sess. 1008 (1848)	22
H. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162	24
H. Rep. No. 1629, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252	10, 24, 26
ARTICLES	
David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279 (1992)	19, 20
Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916 (1988)	10, 17

TABLE OF AUTHORITIES—Continued

Page

Magistrate Judges Division of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993) 10, 12, 17

Judith Resnik, *Failing Faith*, 53 U. Chi. L. Rev. 494 (1986) 17

Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990) .. 8, 20

BOOKS

M. Cherif Bassiouni, *International Extradition: United States Law & Practice* (2d rev. ed. 1987) 7, 19, 20

MISCELLANEOUS

Local Rule 9, Rules for Proceedings Before Magistrates, United States District Courts for the Southern and Eastern District of New York Joint Rules for General, Civil, Criminal, Admiralty and Magistrate Proceedings and the Eastern District's Standing Orders of the Court on Effective Discovery in Civil Cases (7th printing, November, 1991) 2, 4, 12

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for the Eastern District of New York,

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**Petition for a Writ of Certiorari to the
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for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Austin respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this case. Petitioner seeks review of the magistrate's jurisdiction to order the Petitioner extraditable to the United Kingdom.

OPINIONS BELOW

The decision of the Court of Appeals denying the petition for a writ of habeas corpus is reported at 5 F.3d 598 and is at Appendix 1a-14a. The corrected order of the district court denying the petition for a writ of habeas corpus is unreported and is at Appendix 15a-26a. The Court of Appeals' order denying the petition for rehearing and suggestion for rehearing in banc is unreported and is at Appendix 27a-28a. The order of extraditability issued

by Magistrate Judge Zachary W. Carter is unreported and is at Appendix 29a-31a. The mandate from the Second Circuit is unreported and is at Appendix 32a.

JURISDICTION

The judgment of the United States District Court for the Eastern District of New York was entered April 19, 1993. A timely notice of appeal was filed May 5, 1993. The judgment of the United States Court of Appeals for the Second Circuit was entered September 21, 1993. The Court of Appeals denied the petition for rehearing November 5, 1993.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2241(a).

CONSTITUTIONAL, TREATY, STATUTORY AND RULE PROVISIONS INVOLVED

The following constitutional, treaty, statutory and rule provisions are involved in this case and are set forth at Appendix 34a-59a; Article III; Fourth and Fifth Amendments; Treaty of Extradition between the United States and United Kingdom; Supplementary Treaty of Extradition Between the United States and the United Kingdom; 18 U.S.C. § 3184 (Fugitives from foreign country to United States); 28 U.S.C. § 636 (Federal Magistrates Act); Local Rule 9 of the Joint Rules for General, Civil, Criminal, Admiralty and Magistrate Judge Proceedings in the United States District Courts for the Southern and Eastern Districts of New York (7th printing Nov. 1991).

STATEMENT OF THE CASE

This case challenges the boundaries of non-Article III jurisdiction: Do the Constitution and the statutory framework permit a magistrate to exercise the "essential attributes" of the Federal Judiciary by making the ultimate adjudicatory determination to order the extraditability of

Petitioner to a foreign country? Or do the Constitution and the statutory scheme require ultimate adjudicatory determination by an Article III Judge where the "essential attributes" of our constitutional tripartite structure and the "fundamental rights" at its core are at stake?

Here, the Clerk of the Court automatically assigned Petitioner's extradition case to a magistrate for decisions on substantial constitutional issues. The assignment occurred automatically in the sense that the Clerk performed a ministerial function pursuant to local rule, without Article III involvement.

No Article III Judge ever assigned or considered the assignment of the case to the magistrate. No Article III Judge ever considered Petitioner's case. No Article III Judge ever reviewed or accepted the magistrate's final order. The assignment and subsequent proceedings decided by the magistrate were without consent and with no Article III involvement. The magistrate heard and decided specific constitutional issues including Fourth Amendment probable cause and Fifth Amendment Due Process. Permitting a magistrate the ultimate adjudicatory authority involving issues of fundamental rights is a radical departure from the Court's decisions that an Article III Judge retain the ultimate power to issue final decisions. *See Peretz v. United States*, 501 U.S. ——, 111 S. Ct. 2661, 2669 (1991); *United States v. Raddatz*, 447 U.S. 667 (1980).

The magistrate's action affects issues fundamental to our system of government: (1) the balance of the constitutional tripartite system, (2) the role of the Article III Judiciary, and (3) the Petitioner's interest in liberty and Due Process before expulsion from the United States to stand trial in a foreign country.

The boundaries of non-Article III subject-matter jurisdiction are squarely presented in this case.

A. Proceedings Below

Petitioner Michael Austin, a United States citizen, is the subject of an international extradition request.[1]

1. Proceedings Before Magistrate

When a complaint for provisional arrest of Petitioner was filed in the United States District Court for the Eastern District of New York, the Clerk of the Court, with no possibility for an Article III Judge's involvement or exercise of discretion, assigned the matter to a United States Magistrate pursuant to Rule 9, Rules for Magistrate Judges, United States District Courts for the Eastern and Southern Districts of New York. Rule 9 provides:

> Issuance of Warrants and Hearings
>
> Pursuant to 18 U.S.C. § 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein.

Pursuant to that local rule, the Clerk automatically assigns all international extradition cases to magistrates.

The magistrate heard and decided the extradition matter—probable cause and, ultimately, certification of Petitioner's extraditability from the United States. There was no opportunity for assignment, review or supervision by an Article III Judge, other than the collateral and limited review afforded by habeas corpus proceedings.[2]

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[1] The United Kingdom seeks his extradition to stand trial for alleged violations of British law, specifically murder and conspiracy to murder.

[2] Extradition orders have been held not appealable because they do not emanate from the federal courts' authority but, rather, fall within the Executive's discretion. *Fernandez v. Phillips*, 268 U.S. 311 (1925); *In re Mackin*, 668 F.2d 122, 125-30 (2d Cir. 1981).

Habeas review of an extradition order is limited to deciding "whether the magistrate had jurisdiction, whether the offense

2. *Judicial Proceedings*

Petitioner challenged the magistrate's order in a habeas corpus action, pursuant to 28 U.S.C. § 2255, brought before the district court. Such petition, providing merely the most limited form of Article III review, was the only permissible procedure following the order of extraditability. The district court denied relief.

Petitioner filed an appeal pursuant to 28 U.S.C. §§ 1291, 2241 and 2253. The appeal, limited under habeas review, challenged the magistrate's jurisdiction to decide and order Petitioner's extraditability where there was no opportunity for Article III involvement at any turn of the litigation. Petitioner argued the magistrate lacked jurisdiction under the statute and the Constitution.[3]

In a sixteen-page decision denying the appeal, the Court of Appeals relied heavily upon 28 U.S.C. § 636(a)(1), a section of the Federal Magistrates Act stating that magistrates have jurisdiction over "all powers and duties conferred or imposed upon United States commissioners." App. at 8a, *citing In re Farez,* 8 F. Cas. 1007 (C.C.S.D.N.Y. 1870) (No. 4,645). The Appeals Court considered whether the Constitution and statutory scheme granted the magistrate jurisdiction over international extradition cases. It found no violation of the statute or Constitution, even though the magistrate decided Petitioner's case with no Article III involvement because "[e]xtradition magistrates do not exercise powers traditionally

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charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez,* 268 U.S. at 312.

[3] Petitioner also argued: (1) probable cause was lacking because the provisional warrant and complaint contained no words whatsoever establishing probable cause, and no subsequent warrant or complaint was issued; and (2) 18 U.S.C. § 3190 did not apply because Petitioner did not "escape" from the United Kingdom. The Second Circuit found the evidence against Petitioner "less than overwhelming." App. at 14a.

'reserved to Article III courts.'" App. at 10a. The Second Circuit, relying on the district court's powers to appoint and remove magistrates and to promulgate local rules, determined "the integrity of the judicial branch" was "adequately safeguarded." App. at 12a.

Petitioner subsequently filed a petition for rehearing and suggestion for rehearing in banc which was denied without opinion.

B. Constitutional and Statutory Framework

Article III provides that an Article III Judge shall decide:

> all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made.

U.S. Const. art. III, § 2. For more than two centuries, lacking a clear definition of the constitutional boundaries of non-Article III jurisdiction, lower courts have inconsistently administered international extradition cases. In some cases a non-Article III adjudicator decides extraditability[4] and in others an Article III Judge.[5] Sometimes within the same district, extradition cases are administered inconsistently.[6]

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[4] *See, e.g., Rice v. Ames*, 180 U.S. 371 (1901) (magistrate in the Northern District of Illinois); *Hill v. United States*, 737 F.2d 950 (11th Cir. 1984) (magistrate in Southern District of Florida); *Esposito v. Adams*, 700 F. Supp. 1470 (N.D. Ill. 1988) (magistrate in Northern District of Illinois).

[5] *Collins v. Miller*, 252 U.S. 364 (1920) (Judge in Eastern District of Louisiana; *Charlton v. Kelly*, 229 U.S. 447 (1913) (Judge in New Jersey); *David v. Attorney Gen. of the United States*, 699 F.2d 411 (7th Cir.) (Judge in Southern District of Illinois), *cert. denied*, 464 U.S. 832 (1983); *In re Prushinowski*, 574 F. Supp. 1439 (E.D.N.C. 1983) (Judge in Eastern District of North Carolina).

[6] *Compare In re McMullen*, 989 F.2d 603 (2d Cir.) (Judge in Southern District of New York), *cert. denied sub nom. McMullen v. United States*, —— U.S. ——, 114 S. Ct. 301 (1993) *with In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (magistrate in Southern Dis-

Only limited jurisdiction has been delegated to magistrates, adjuncts of the Federal Courts. The Federal Magistrates Act, 28 U.S.C. §§ 631-639, confers upon magistrates subject-matter jurisdiction over the following:

- duties conferred upon United States commissioners by statute or Criminal Rule, duties under 18 U.S.C. §§ 3142 and 3401, and power to sentence for misdemeanors [7];
- certain pretrial matters designated by a Judge [8];
- hearings, including evidentiary hearings designated by a Judge [9];
- additional duties consistent with the Constitution [10]; and
- certain emergency proceedings.[11]

The other critical statute is the Extradition Act, 18 U.S.C. §§ 3181-3196, specifically Section 3184 (Fugitives from foreign country to United States), which requires that a magistrate be "authorized" to conduct an international extradition case.[12] It provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign gov-

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trict of New York). *See also Hooker v. Klein*, 573 F.2d 1360, 1364 (9th Cir. 1978) (first extradition request assigned to magistrate, who denied it; second request assigned to Judge).

[7] 28 U.S.C. § 636(a).

[8] 28 U.S.C. § 636(b)(1)(A).

[9] 28 U.S.C. § 636(b)(1)(B).

[10] 28 U.S.C. § 636(b)(3).

[11] 28 U.S.C. § 636(f).

[12] *See* 1 M. Cherif Bassiouni, "Introduction to the Relationship between the Executive, Legislative and Judicial Branches" and "History of Extradition as Part of the Foreign Relations of the United States," *International Extradition: United States Law and Practice*, ch. II §§ 1-2, at 39-55 (2d rev. ed. 1987) (hereinafter Bassiouni) (an encyclopedic review of international extradition in the United States).

> ernment, any justice or judge of the United States, or *any magistrate authorized so to do by a court of the United States*, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. . . .

18 U.S.C. § 3184 (emphasis added). The statute does *not* confer subject-matter jurisdiction upon magistrates. Rather, Section 3184 restricts the magistrates who can conduct an international extradition case to those who have been specifically "authorized" and received jurisdiction from an Article III Court.

Magistrate jurisdiction[13] over international extradition has been a recurring issue before Article III Courts since 1799, *United States v. Robins*,[14] 27 F. Cas. 825 (D.C.S.C. 1799) (No. 16,175) (full ninety-page opinion available on Westlaw), and before this Court since 1852, where the issue of commissioner/magistrate jurisdiction over the proceedings was first raised, *In re Kaine*, 55 U.S. (14 How.)

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[13] The role now held by magistrate judges was held by United States Commissioners until 1968. 28 U.S.C. § 636 (Historical notes). *See Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (commissioners have limited jurisdiction over "preparatory and preliminary" matters) and *Holiday v. Johnston*, 313 U.S. 342 (1941) (commissioner lacked jurisdiction to preside over habeas corpus case). "Commissioners . . . often were not lawyers." *Gomez v. United States*, 490 U.S. 858, 865 (1989).

[14] The name is spelled inconsistently in court records as "Robins" or "Robbins." *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990) (hereinafter Wedgwood) (reviews historical records and analyzes political history).

103 (1852), *on remand, Ex parte Kaine*, 14 F. Cas. 78 (C.C.S.D.N.Y. 1853) (No. 7,597) (Nelson, J., on circuit). International extradition requests likely will increase, corresponding to the expanding definition of economic crimes and the adoption of this concept by our Treaty partners. The Court has not yet spoken to these constitutional or statutory issues.[15]

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to define the jurisdiction of magistrates and to safeguard the role of the Article III Judiciary. Three compelling reasons call for the Court to grant review of this case: (1) The decision raises unsettled fundamental constitutional issues impinging upon the independent Judiciary, the Separation of Powers and the Petitioner's liberty and Due Process interests; (2) Apart from any constitutional issue, the case presents a substantial issue of whether the statutory framework requires Article III involvement; and (3) The case presents recurring issues regarding the limits of magistrate jurisdiction and the lower courts' inconsistent administration of international extradition cases.

Petitioner's case presents a unique opportunity for the Court to draw the lines of the constitutional and statutory boundaries of magistrate jurisdiction where:

- Petitioner gave no consent;
- The district court made no reference of assignment; and
- The Article III Judiciary had no involvement.

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[15] Two terms ago, a case filed with the Court presented the issue of magistrate jurisdiction in international extradition proceedings, but the parties settled and voluntarily dismissed the petition for certiorari. *See Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed sub nom. Ward v. Attridge*, 501 U.S. ——, 111 S. Ct. 2844 (1991).

Magistrates themselves have questioned the scope of their jurisdiction. *See* Magistrate Judges Division of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 251-53 (1993) (considering constitutional issues regarding the boundaries of magistrate jurisdiction). *See also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916 (1988) (addressing concerns over non-Article III jurisdiction).

Self-executing commissioner and magistrate jurisdiction of international extradition is an anomaly of an obsolete time. Historically, administration of the early extradition cases depended upon which adjudicator, an Article III Judge or a commissioner, first reached the alien fugitive in the remote frontier lands.[16] That need long-ago vanished once the remote territories were settled and modern transportation developed. The historical record of inconsistent administration of international extradition proceedings does not validate the constitutionality of a magistrate's deciding and certifying the extradition of a United States citizen to a foreign country.[17]

In the Supreme Court's first international extradition case, four of the seven sitting Justices (three in dissent and one concurring) agreed that the commissioner[18] lacked jurisdiction to issue the final order of extraditabil-

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[16] The congressional intent for commissioners to conduct proceedings arose from the remoteness of the territories and difficult travel. *Cong. Globe*, 30th Cong., 1st Sess. 868 (1848); *see also In re Mackin*, 668 F.2d at 126.

[17] The historical record, in fact, highlights the "inconsistencies," "disparities" and "significant defects" in the functions of commissioners. H. Rep. No. 1629, 90th Cong., 2d Sess. 1-4 (1968), *reprinted in* U.S.C.C.A.N. 4252-56.

[18] Magistrate judges now serve in the role once held by United States commissioners. *See* 28 U.S.C. § 636, Revision Notes.

ity. *In re Kaine*, 55 U.S. (14 How.) at 142.[19] A commissioner could not "exercise . . . so high and delicate a power over the rights and liberty of the citizen." *Id.* (Nelson, J., dissenting opinion).

This Court should grant certiorari to establish the limits of magistrate jurisdiction and to guide lower court administration of this international extradition case. The case presents recurring issues of constitutional and statutory importance, especially ripe for consideration in light of the Court's recent efforts to establish the boundaries of non-Article III jurisdiction.[20]

I. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S EXERCISE OF JURISDICTION IN ISSUING THE FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN VIOLATES ARTICLE III OF THE UNITED STATES CONSTITUTION, WHERE THERE WAS NO CONSENT AND WHERE THE ARTICLE III JUDICIARY ABDICATED ITS DUTIES TO ASSIGN, SUPERVISE, AND REVIEW THE CASE

This case challenges the extent to which the role of non-Article III adjudicators may intrude upon the tripartite system reserved to the Executive, Legislative and Judicial Branches. In this case, a non-Article III adjudicator exercised unfettered jurisdiction to decide the extraditability of Petitioner, a United States citizen, to a foreign country. No Article III Judge was involved in the decision and no Article III review was possible.

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[19] The majority dismissed the case, holding the Court lacked jurisdiction to review a commissioner's final order. *In re Kaine*, 55 U.S. (14 How.) at 103.

[20] *See Peretz*, 501 U.S. ——, 111 S. Ct. at 2661; *Gomez*, 490 U.S. at 858; *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); and *Raddatz*, 447 U.S. at 667.

A. The Court Has Never Determined The Constitutionality of A Magistrate's Deciding the Ultimate Matter in An International Extradition Case

This Court has never determined the extent to which the essential attributes of Article III and the fundamental structures of Separation of Powers allow delegation to a non-Article III adjudicator of a foreign nation's request for the extradition of a United States citizen. Magistrates recently identified this constitutional issue as unsettled before this Court. *See A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. at 252-53 n.5.

In Petitioner's case, the Clerk of the district court ministerially and automatically assigned the complaint for international extradition to a magistrate, pursuant to Local Rule 9.[21] All proceedings in Petitioner's extradition case were conducted by magistrates.[22] No Article III Judge reviewed the case or the appropriateness of the assignment. No Article III Judge was assigned the case for supervision or review of the magistrate's final decision.[23] No opportunity existed to request an Article III Judge or to challenge the magistrate assignment. A magistrate ordered Petitioner's extraditability—a final, dispositive order, which is not reviewable on direct appeal. *Collins v. Miller*, 252 U.S. 364, 369 (1920).

The only method to challenge the magistrate's dispositive decision of this United States citizen's extraditability

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[21] Local Rule 9 reads: "Pursuant to 18 U.S.C. § 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein." The local rule may be read to permit specific authorization consistent with Petitioner's argument here; therefore, it is unconstitutional only as applied.

[22] Three different magistrates presided seriatim over different proceedings in Petitioner's case.

[23] The magistrates decided issues based on Petitioner's Fourth and Fifth Amendment rights, including the sufficiency of the complaint and affidavit and whether there was probable cause to expel Petitioner from the country of his citizenship.

is the limited and collateral examination habeas corpus provides. *Id.*; *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1402 (9th Cir. 1988). Hence, Petitioner pursued the only avenue available to challenge the magistrate's order and filed a petition for habeas corpus relief.

B. A Trilogy of This Court's Decisions Addresses the Boundaries of Non-Article III Jurisdiction

In a trilogy of cases, this Court recently has considered the constitutionality of non-Article III jurisdiction and the boundaries of Article III "structural protections." *See Peretz v. United States*, 501 U.S. ——, 111 S. Ct. 2661 (1991); *Gomez v. United States*, 490 U.S. 858 (1989); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). These structural protections[24] safeguard and maintain an "independent judiciary within the constitutional scheme of tripartite government." *Schor*, 478 U.S. at 847-48.

In reviewing Article III challenges, the Court has employed a pragmatic, flexible approach rather than a formalistic one. *Schor*, 478 U.S. at 851-52. In *Schor*, the Court reviewed a quasi-judicial authority empowered to decide common law claims arising out of commodities trade. The Court applied a structural analysis to determine the permissible scope of non-Article III jurisdiction, weighing the following three factors:

(1) "[T]he extent to which the 'essential attributes of judicial power' are reserved to Article III

[24] In addition to the structural precepts, Article III also safeguards personal interests. *Schor*, 478 U.S. at 848. Petitioner is not arguing his personal rights under the Fourth and Fifth Amendments. Those personal interests come into play, however, in considering whether the rights decided by the non-Article III tribunal are of such import that they go to the heart of Article III's essential attributes and raise structural concerns. *See id.* at 851 (discussing factors to be considered when deciding the constitutional validity of non-Article III adjudication).

courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts";

(2) "[T]he origins and importance of the right to be adjudicated"; and

(3) "[T]he concerns that drove Congress to depart from the requirement of Article III."

Id. The majority cautioned that structural concerns would be implicated where Congress created non-Article III tribunals to decide the "entire business of the Article III courts without any Article III supervision and without evidence of valid and specific legislative necessities." *Id.* at 856.

In *Gomez*, a unanimous Court applied those three factors to examine the delegation to a magistrate of felony voir dire. *Gomez*, 490 U.S. at 860. The Court addressed the constitutional question implicated [25] but based its holding on statutory grounds, applying its policy to avoid constitutional issues where possible. *Id.* at 864, 872 n.25. Under the statutory analysis, the Court held a magistrate could not assume voir dire of felony juries over a defendant's objection. *Id.* at 876.

In its most recent decision involving Article III and magistrate jurisdiction, the Court employed both a constitutional and a statutory analysis. *Peretz*, 501 U.S. at ——, 111 S. Ct. at 2661. Again, the Court was presented with the question of a magistrate's authority to

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[25] The Court's opinion turned on its reading of the Federal Magistrate Act "additional duties clause," as construed within the constraints of Article III. *Gomez*, 490 U.S. at 860-872. The Court upheld the constitutionality of delegating felony voir dire to a magistrate where there was consent or waiver, but noted that any additional duties assigned a magistrate must "bear some relationship to the specified duties" in the Act. *Id.* at 864.

conduct felony voir dire, but where the party expressly and repeatedly consented. The Court found that where the party consented the delegation was permissible under the Federal Magistrates Act. *Id.* 501 U.S. at ——, 111 S. Ct. at 2666-67. The Court applied both a personal and a structural analysis. By expressly consenting, Peretz waived any *personal* right to an Article III Judge.

For the *structural* analysis, the Court found no infringement upon Article III "structural protections," because the trial court, through its procedures, maintained "total control and jurisdiction," a situation not present in Petitioner's case. *See id.*, 501 U.S. at ——, 111 S. Ct. at 2669-70, *citing Raddatz*, 447 U.S. at 681.

The Court relied on the following factors to decide whether the structural protections satisfied Article III requirements:

(1) the Article III Court decides whether to assign a matter to the magistrate;

(2) the Article III Court decides whether to accept or adopt the work performed by the magistrate; and

(3) "[m]agistrates are appointed and subject to removal by Article III judges."

Id.

Two of the above three factors are not satisfied in Petitioner's case. Although the magistrate here was appointed by the Article III court and is subject to removal, no Judge in this case had (nor practically could have had) any involvement even to know of the magistrate's decision. This case affects the essence of Article III jurisdiction, yet meaningful Article III review is completely absent.

C. The Decision Below Is Contrary to This Court's Prior Holdings and Violates Article III

The Court of Appeals decision is irreconcilable with previous holdings of this Court: *Peretz, Schor, Gomez,* and a case from the turn of the century, *Ng Fung Ho v. White,* 259 U.S. 276 (1922).

In *Ng Fung,* this Court overturned the historical practice of a commissioner exercising jurisdiction to deport an alleged alien claiming citizenship. The Court held the structural protection of an Article III adjudication was required because of the Due Process concerns implicated. *Ng Fung,* 259 U.S. at 284-85.

Prior to the holding in *Ng Fung,* commissioners exercised comparable jurisdiction in deportation and international extradition cases. Like deportation, international extradition implicates serious constitutional issues: Article III, Separation of Powers and personal constitutional interests. *In re Mackin,* 668 F.2d at 130. Allowing magistrates to conduct and decide international extradition cases with no Article III assignment, supervision or review is analogous to commissioners' deciding deportation cases, an unconstitutional practice that this Court prohibited. Article III structural safeguards require that the *Ng Fung* ruling be applied to the extradition of United States citizens.

More recent opinions of magistrate jurisdiction confirm such jurisdiction is limited. See *Peretz, Schor* and *Gomez,* discussed below.

Petitioner's case embodies the very structural concerns that this Court consistently has cautioned would impermissibly intrude upon Article III power and independence. *Peretz,* 501 U.S. at ——, 111 S. Ct. at 2669-71; *Schor,* 478 U.S. at 856; *Raddatz,* 447 U.S. at 683. The "entire business" of this international extradition case has been given the magistrate "without any Article III supervision and without evidence of valid and specific legislative

necessities." *Schor*, 478 U.S. at 855. The magistrate performed duties that cannot conceivably be considered "subsidiary," *Gomez*, 490 U.S. at 870, and impermissibly breached into the boundaries of subject-matter reserved to the Article III Judiciary.[26]

It matters not whether the impermissible delegation results from the trial court's unlawful abdication or Congress's unlawful delegation. "[T]he Constitution guarantees not merely that no Branch will be forced by one of the *other* Branches to let someone exercise its assigned powers—but that none of the Branches will *itself* alienate its assigned powers." *Peretz*, 501 U.S. ——, 111 S. Ct. at 2680 (Scalia, J., dissenting) (emphasis in original).

Application of the three *Schor* factors to Petitioner's case argues forcefully for invalidating this judicial abdication:

(1) The extent to which "essential attributes" of Judicial Power are reserved to Article III Courts:

> **Here, none are so reserved—the non-Article III tribunal makes the ultimate adjudicatory determination of all constitutional rights at issue.**

(2) The "origins and importance of the right to be adjudicated":

> **Here, there are fundamental and important constitutional rights such as Fourth Amendment probable cause to decide whether a crime has been committed and Fifth Amendment Due Process.**

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[26] Numerous authors have addressed the controversy over the permissible scope of non-Article III adjudication. *See, e.g., Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. at 247; Fallon, 101 Harv. L. Rev. at 933-79 (especially pp. 976-79, addressing need for an Article III Judge to review questions of law); Judith Resnik, *Failing Faith*, 53 U. Chi. L. Rev. 494, 524-25 (1986) (discussing the expanded role of non-Article III adjudication).

(3) The "concerns that drove Congress to depart from the requirement of Article III":

> **Whatever concerns once existed for Congress to encroach upon Article III and authorize commissioners/magistrates, vanished long-ago with the wild west and frontier land.**

To allow a magistrate to make the ultimate, nonreviewable decision [27] in an international extradition case conflicts with Article III and this Court's prior holdings. Consequently, the Court should grant certiorari, reverse the Court of Appeals opinion, and order an Article III Judge's involvement in deciding a foreign nation's request to extradite a United States citizen to a foreign country.

II. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN TO STAND TRIAL IN A FOREIGN COUNTRY WITH NO INVOLVEMENT OF THE ARTICLE III JUDICIARY VIOLATES 18 U.S.C. § 3184 AND 28 U.S.C. § 636.

This Court has never decided the extent to which the relevant statutory scheme permits a magistrate to exercise Article III jurisdiction in an international extradition case. The decision below construed 28 U.S.C. § 636(a)(1) as conferring upon magistrates unfettered jurisdiction, namely, to have ultimate adjudicatory determination over international extradition cases. *See* App. at 8a. The Court of Appeals, citing an 1870 decision from what is now the Second Circuit, App. at 8a, *citing In re Farez*, 8 F. Cas. at 1007, relied primarily upon its view that United States commissioners historically have conducted international extradition cases. However, the *Farez* court noted the parties had not argued the issue of commissioner jurisdiction. Nor does history validate the practice of

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[27] *Collins v. Miller*, 252 U.S. at 364 (discussing limited, collateral review habeas provides).

magistrates exercising complete, unfettered discretion in deciding international extradition cases. *Id.* at 1008.

A. The History of International Extradition Does Not Validate the Practice of Non-Article III Ultimate Adjudication

1. *An Historical Perspective: 1795-1848*

The United States has faced the controversy of international extradition since the Republic's birth. See *United States v. Robins*, 27 F. Cas. at 825. Initially, "the Executive had unfettered discretion" in conducting foreign affairs. *Eain v. Wilkes*, 641 F.2d 504, 513 n.13 (7th Cir. 1981). *See* also 1 Bassiouni, ch. II "History of Extradition" § 2 at 41-55.

1795-1807

In 1795, the United States entered into its first treaty, the Jay Treaty, which provided for international extradition with Great Britain.[28] In 1798, Great Britain first sought extradition through the Executive branch pursuant to the Jay Treaty, requesting surrender of several mutineers from the British frigate, the *Hermione*. President John Adams refused.[29] Britain again sought extradition of additional mutineers, but this time forwarded its request to the federal court. After a federal trial, the men were acquitted.

President Adams finally relented to a third extradition request directed to him by Great Britain in a case related to the *Hermione* mutiny. President Adams' Secretary of State directed the United States district judge to surrender the defendant to Great Britain upon production of sufficient evidence of criminality as would justify holding him for trial. *United States v. Robins*, 27 F. Cas. at 825.

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[28] 8 Stat. 116.

[29] *See* David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 304-06 (1992) (hereinafter Engdahl).

Robins claimed American citizenship to no avail because the court examined only whether there was probable cause. Britain tried, convicted and hanged Robins.

A public outcry ensued over the surrender of one claiming American citizenship, with no examination of the citizenship claim.[30] This outrage resulted, to a large measure, in President Adams' failed re-election bid. *See* 1 Bassiouni, at 4. The public, primarily the Republicans, regarded Adams' extradition request to the district court as an interference in judicial independence and, thus, an infringement on the Constitution. Engdahl, 42 Duke L.J. at 309. Members of Congress unsuccessfully attempted to censure President Adams for his actions in the *United States v. Robins* case. Engdahl, 42 Duke L.J. at 309-14; Wedgwood, 100 Yale L.J. at 354-59. Understandably, no further requests were made for extradition for the next two political generations, approximately the next forty years.

1807-1840

The Jay Treaty's extradition provision lapsed in 1807 and was not renewed.[31] In a few cases, state governments authorized international extradition certification. In 1840, this Court considered whether a state could surrender fugitives to foreign nations. The seven-member Court split on the issue, four holding in favor of such state authority while four other justices held that only the federal government could surrender such fugitives.[32] Subsequently,

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[30] The Court ruled that the law of the treaty was supreme and that Article III expressly provides that judicial power extends to treaties. After hearing and presentation of a British warrant and supporting affidavits, the Court ordered Robins turned over to the British. *United States v. Robins*, 27 F. Cas. at 825 (ninety-page opinion *published on* Westlaw.)

[31] Wedgwood, 100 Yale L.J. at 361.

[32] *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

the matter was decided in favor of exclusive federal jurisdiction.[33]

1842-1847

After the 40-year lapse in United States extradition law, the United States once again adopted an international extradition provision with Great Britain. In the Webster-Ashburton Treaty, the parties sought to avoid the *United States v. Robins* problems and therefore expressly provided for the Judiciary to decide in the first instance whether the accused should be surrendered. Under the Treaty, Judges and commissioners were authorized to issue arrest warrants for persons named in extradition requests and to decide the extraditability of those accused.[34] The Treaty required the judicial authority to decide whether there was sufficient evidence to commit the accused for trial and, if so, to refer the matter to the Executive branch for its final decision on whether to issue a surrender warrant.

In 1844, the United States entered into a similar extradition treaty with France. Subsequent bilateral treaties included extradition provisions.

2. *The International Extradition Statute, First Enacted in 1848, Permits Magistrates to Hear Extradition Cases Only If "Authorized So To Do"*

In 1848, Congress enacted the first piece of legislation to deal with extradition. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The legislative history demonstrates some

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[33] In 1886, the Court held the Constitution reserved to the federal government the authority to surrender a fugitive to a foreign country. *United States v. Rauscher*, 119 U.S. 407, 414 (1886), (following Chief Justice Taney's opinion in the *Holmes v. Jennison* case).

[34] Presumably, the term "magistrates," as used in the Treaty, was the nomenclature for certain British authorities.

Members' concerns about whether a United States citizen could be extradited. *Cong. Globe,* 30th Cong., 1st Sess. 1008 (1848). The debate in the House of Representatives highlighted the need for extradition legislation due to fugitive "foreigners" who slip over our uncontrolled frontier boundaries. *Cong. Globe,* 30th Cong., 1st Sess. 868 (1848).

The enacted legislation provides that a federal Judge, or a "commissioner, **authorized so to do** by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may upon complaint made under oath" issue a warrant for arrest of the requested person so evidence of criminality may be heard and considered. If the evidence is sufficient to sustain the charge, that finding is certified to the Secretary of State who is authorized to order extradition and surrender of the accused.

In 1847, the Judiciary considered the first case brought under the new statute. Cautious to avoid the error of President Adams, President Polk referred the request for extradition to a United States district judge for a full hearing. *See In re Metzger,* 46 U.S. (5 How.) 176, 188 (1847). The Supreme Court reviewed the case on a petition for habeas relief and determined that review of an extradition request *is* a matter for the Judiciary and the Executive Branch had acted "very properly." *Id.* at 188-89.

Ex Parte Kaine, 14 F. Cas. at 80, decided five years after the new legislation was enacted, held that a commissioner could not determine an extradition matter where he had not been specially appointed, consistent with the Act of 1848. The Supreme Court had previously reviewed and dismissed the case for lack of jurisdiction. *In re Kaine,* 55 U.S. (14 How.) at 103.

From the late 1840's to the present, extradition cases have continued to be decided by federal Judges or commissioners (later magistrates). Only in 1912, more than

sixty years after the legislation became effective, did this Court decide that United States citizens are not exempt from foreign extradition unless the treaty so provides. *Charlton v. Kelly*, 229 U.S. at 467.

The present statute remains substantively unchanged from the original.[35] In 1968, the term "magistrate" was substituted for "commissioner." [36]

B. The 1968 Federal Magistrates Act Remedied Defects in the Commissioner System

In its first session in 1793, Congress created the position of commissioner.[37] That original statute authorized a person "learned in the law" to take bail for appearance if necessary. *Id.* In 1812, Congress expanded the functions of commissioners to include hearing land claims and to provide compensation. Act of Feb. 20, 1812, 2 Stat. 672. Commissioners often were not lawyers or otherwise qualified for such service. *Gomez*, 490 U.S. at 865.

Commissioners' powers gradually increased. In 1817, Congress also authorized commissioners to take affidavits and to "exercise all the powers that a justice or judge of any of the courts of the United States may exercise [under Section 30 of An Act to Establish the Judicial Courts of the United States]." Act of Mar. 1, 1817, 3 Stat. 350. An 1842 act further expanded the commissioners' jurisdiction to include taking of depositions of

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[35] *See* Act of June 19, 1876, ch. 133, 19 Stat. 59; Rev. Stat. § 5270, Act June 6, 1900, ch. 793, 31 Stat. 656 (renumbered the provisions at 18 U.S.C. §§ 651, *et seq.*); 18 U.S.C. §§ 3184-3195, June 25, 1948, ch. 645, § 1, 62 Stat. 822 (renumbered and phrase changes). In 1873, the international extradition statutes were recodified at Sections 5270 through 5276 of the Revised Statutes. *See* Rev. Stat. §§ 5270-76 (1873). *See also* Act of Aug. 3, 1882; 18 U.S.C. §§ 3184, *et seq.*, June 25, 1948, ch. 645, § 1, 62 Stat. 822.

[36] Federal Magistrate Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, Title III, § 301(a)(3).

[37] An Act to Establish the Judicial Courts of the United States, Act of Mar. 2, 1793, 1 Stat. 334.

witnesses in civil matters and exercising "any power that any justice of the peace or other magistrate" could exercise "by arresting, imprisoning, or bailing the same." Act of Aug. 23, 1842, 5 Stat. 516.

In 1968, when Congress abolished the office of commissioner,[38] magistrates were given all "powers and duties previously conferred or imposed upon United States Commissioners by law. . . ." [39] Soon after enactment of the Federal Magistrates Act, controversies arose concerning the scope of magistrates power.[40] In response, Congress amended the Act to grant additional magistrate powers.[41] Notwithstanding the expansion of powers, wherever important rights are involved, magistrate authority requires Article III supervision and review, the opportunity for such supervision and review, or the consent of the parties.

C. The Present Statutory Scheme Does Not Permit a Magistrate to Make the Ultimate Adjudicatory Determination

A magistrate cannot act lawfully pursuant to long-standing federal court practice and local rule if that practice is "a departure from the plain mandate of the

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[38] Federal Magistrates Act, 28 U.S.C. § 636.

[39] The Congressional history supports Petitioner's argument that Section 636(a)(1) does not effectively confer jurisdiction upon magistrates to conduct and decide international extradition cases: "Many commissioners lack an understanding of the true nature of their statutory functions; there is great disparity from district to district on how even fundamental problems are handled, due in great measure to inadequate statutory guidelines and the lack of any effective administrative apparatus within the judiciary that is charged with assisting commissioners in the performance of their duties." H. Rep. No. 1629, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4261.

[40] *See Wingo v. Wedding*, 483 F.2d 1131, 1132 (5th Cir. 1973), *aff'd*, 418 U.S. 461 (1974).

[41] *See* H. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169.

statute." *Holiday v. Johnston*, 313 U.S. at 351 (holding Commissioners could not conduct habeas corpus proceedings under a local rule where the statute plainly required the proceedings before a judge); *see also Wingo*, 418 U.S. at 461.

1. *The Extradition Statute Confers No Jurisdiction Upon Magistrates, As the Plain Terms Require Special Authorization*

The Extradition Act does not grant jurisdiction to a magistrate for international extradition cases, unless the magistrate has been "authorized so to do." The plain terms of 18 U.S.C. § 3184, require that a magistrate be specially authorized to preside over an international extradition case. Section 3184 confers no jurisdiction upon magistrates. Rather, it directs that only a federal or state judge or "a magistrate authorized so to do" can preside over extradition matters.

Federal courts have interpreted Section 3184 to require a Judge's special authorization. *See Rice*, 180 U.S. at 378 ("the only qualification required of a commissioner to act in extradition cases is that suggested by Rev. Stat. § 5270, that he shall be 'authorized so to do by any of the courts of the United States' "); *Vaccaro v. Collier*, 38 F.2d 862, 867 (D. Md. 1930) ("jurisdiction in such cases must be expressly given to the commissioner . . . [as] expressly given by *order* of this court," emphasis added), *aff'd in part and rev'd in part*, 51 F.2d 17 (4th Cir. 1931); *Ex Parte Kaine*, 14 F. Cas. at 80. However, some courts, perhaps confused by the archaic language of those cases, have misconstrued or sidestepped the letter of the law.[42]

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[42] For example, the Second Circuit below mistakenly relied on *In re Adutt*, 55 F. 376 (C.C.D. Ill. 1893), to reject Petitioner's argument that the existence and sufficiency of a complaint and warrant go to subject-matter jurisdiction. In fact, close parsing of the decision reveals the *Adutt* court held to the contrary: "[t]he [petitioner's] fifth objection—that the complaint is defective as to

2. *The Magistrates Act Does Not Confer Powers on Magistrates to Conduct Extradition*

The Court of Appeals interpreted 28 U.S.C. § 636 (a)(1) to confer jurisdiction upon magistrates relying on the terms: "all powers and duties conferred or imposed **upon United States Commissioners by law."** (Emphasis added.) But, under that subsection, magistrates cannot receive jurisdiction greater than that previously conferred upon commissioners under the earlier version of Section 3184, which had identical language to the present text. Unless there was authorization "so to do," commissioners had no authority to hear and decide extradition cases. Section 3184 did not, by itself, confer subject-matter jurisdiction on commissioners; thus, magistrates cannot derive independent jurisdiction from 28 U.S.C. § 636(a)(1) to conduct international extradition cases. Rather the present Section 3184, just like the 1848 statute's identical terms, requires that an Article III Court confer special jurisdiction upon a magistrate, who has no subject-matter jurisdiction unless "authorized so to do." To read otherwise would leave meaningless the words "authorized so to do" in 18 U.S.C. § 3184.[43]

Not only is commissioner jurisdiction over international extradition cases not self-executing, but it also does not derive from any "historical" legal basis.[44]

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jurisdiction—cannot . . . be sustained." *Id.* at 378. "I am inclined to hold this complaint sufficient to give the commissioner jurisdiction, because it charges the crime of forgery." *Id.* at 379.

[43] A Court has confirmed that special authorization must be conferred. *See, e.g., Vaccaro v. Collier*, 38 F.2d at 867 ("jurisdiction in such cases must be expressly given to the commissioner . . . [as] expressly given by *order* of this court") (emphasis added).

[44] Remarks in the legislative history of the Federal Magistrates Act state: "Many commissioners lack an understanding of the true nature of their statutory functions; *there is great disparity from district to district on how even fundamental problems are handled, due in great measure to inadequate statutory guidelines.*" H. Rep. No. 1629, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252.

Section 636(a)(1) refers instead to other commissioner powers imposed by law, pursuant to existing statutes, such as the following, independently conferred "powers and duties" [45]; *as cited in Go-Bart*, 282 U.S. at 156 n.2; 28 U.S.C. § 758 (1926) (authorizes commissioners to take bail and affidavits); 28 U.S.C. § 392 (1926) (authorizes them to take oaths); and 28 U.S.C. § 393 (1926) (authorizes them to enforce determinations of foreign consuls). Each of these laws directly conferred jurisdiction upon commissioners.

3. *A Local Court Rule Does Not Validate An Unconstitutional Practice*

A local rule cannot confer upon a magistrate subject-matter jurisdiction exceeding that provided by statute. *See Wingo*, 418 U.S. at 472-73 (magistrates are not authorized by the statute to hear habeas corpus proceedings even where local rule so provides). This decision led to modifications in the Magistrates Act and additional magistrate powers. *Wingo* held that a local rule cannot provide jurisdiction greater than that granted by the statute.

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[45] 28 U.S.C. § 636(a)(1) confers upon magistrates jurisdiction over "all powers and duties" conferred by law upon commissioners. 18 U.S.C. § 3184 conferred no jurisdiction upon commissioners and, therefore, is not implicated in Section 636(a)(1).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

VICTORIA TOENSING
Counsel of Record
JOSEPH E. DIGENOVA
STEVEN L. ZELINGER
SUZANNE M. DOHRER
MANATT, PHELPS & PHILLIPS
1200 New Hampshire Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 463-4300
Counsel for Petitioner